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No. 84-823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DOE NO. 462,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against self-incrimination continues to protect an individual from the compelled disclosure of his personal documents.

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent respectfully submits this brief in opposition to the government's petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinion of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D) was entered on September 24, 1984. The petition for a writ of certiorari was filed on November 21, 1984. The government invokes the jurisdiction of this Court under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

STATEMENT

On March 21 and 22, 1984, a federal grand jury sitting in the Eastern District of Virginia issued three subpoenas *duces tecum* to respondent. Two of the subpoenas sought business records and were issued to the respondent in his capacity as the president of two wholly owned corporations. The third subpoena was issued to respondent in his individual capacity and explicitly called for the production of respondent's personal records, as well as the business records of respondent's sole proprietorship. *See* C.A. App. 3-6F; Pet. App. E.

On April 10, 1984, respondent moved to quash that portion of the subpoena *duces tecum* served on him as an individual calling for the production of his personal records on the ground that such production would violate his Fifth Amendment privilege against self-incrimination. *See* C.A. App. 7-8; Pet. App. 2a - 5a.

On April 13, 1984, the United States District Court for the Eastern District of Virginia granted respondent's motion to quash to the extent that the subpoena called for the production of respondent's personal records. The district court also directed respondent's counsel to submit *in cam-*

era a detailed "listing of those documents which are asserted to be personal records, with sufficient identification of such document to enable the court to make a determination whether it is a personal or business record." *See* Pet. App. C. In addition, the district court, on the government's motion pursuant to 18 U.S.C. §§ 6002 and 6003, ordered that immunity be granted to respondent for the act of production and identification before the grand jury of the records called for in the subpoena. The immunity order did not extend so as to protect respondent from any incriminatory aspects of the contents of the personal documents. *See* C.A. App. 53-55, 57-58; Pet. App. 5a, 15a.

On April 19, 1984, following the *in camera* inspection of respondent's list of personal documents, the district court found that all of the listed documents were "clearly . . . personal" and, in accordance with its April 13 order regarding the Fifth Amendment privilege, ruled that respondent need not produce them to the grand jury. *See* Pet App. B. Accordingly, on April 19, 1984, respondent produced and identified for the grand jury all of the subpoenaed corporate and sole proprietorship business records while retaining possession only of the specific documents which the district court found to be "clearly personal".

The court of appeals affirmed the trial court's ruling and held "that the fifth amendment prevents the government from subpoenaing an individual's incriminating papers that are in his possession and are held by him in an individual, as opposed to representative capacity." *See* Pet. App. 12a.[1]

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[1]At the time respondent's Brief In Opposition went to print, proceedings were pending in the district court which may materially affect the state of the record in this case. The district court has scheduled an evidentiary hearing to determine whether the govern-

REASONS FOR DENYING THE PETITION

Petitioner contends (Pet. at 5-6) that this case presents an important and recurring question because "financial records of individuals are often of great value in detecting and investigating crime and are therefore subpoenaed frequently." This statement contains two inaccuracies. First, as discussed *infra*, this case involves *personal* records, not "financial records" nor "business records" as petitioner would prefer to describe them. Second, petitioner provides no support for its assertion that such records are subpoenaed frequently nor does it suggest that prosecutors have had any difficulty respecting the *Boyd* limitation[2] on their grand jury subpoena power. Therefore, the question presented in this case is not a recurring one. Petitioner's result-oriented justification for seeking certiorari—that personal records are of "great value in detecting and investigating crime" such that summary reversal of the court of appeals is warranted—simply glosses over the fact that the government is attempting to expand its subpoena power into an area heretofore untouched by such intrusion.

Contrary to petitioner's assertion (Pet. at 5), the court of appeals decision in this case is not "in conflict with applicable decisions of this Court." *See* Supreme Court Rule 17.1(c).

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ment gained access to certain attorney client privileged documents, in violation of the court's order, and disclosed such documents to the grand jury. Among other things, this inquiry will include a determination of whether the detailed listing of respondent's personal documents which the district court requested on April 13, *see* accompanying text, was also obtained by the government. The district court's rulings on this matter, including the possible imposition of sanctions against the government, could materially affect the state of the record. Indeed, the question of whether the government may obtain respondent's personal records may be moot.

[2]*See Boyd* v. *United States*, 116 U.S. 616 (1886) discussed *infra*.

The Fifth Amendment protection for personal papers is well settled. Indeed, it is petitioner who attempts to create a conflict by asking this Court to expressly overrule *Boyd*, as well as disavow all statements supporting *Boyd* in its more recent decisions.

1. Throughout its petition, the government repeatedly refers to the records at issue here as "business and financial records" (Pet. at 5, 6, 9, 11, 12, 13). As explained *supra*, all corporate and sole proprietorship documents have been produced for the grand jury. A review of the record reveals that the only remaining undisclosed documents are clearly "personal records." First, the subpoena explicitly calls for the production of the "personal records of [John Doe]." Pet. App. 18a, ¶ I. Second, after reviewing the *in camera* list of documents covered by the subpoena, the district court found the documents at issue to be "clearly personal." Pet. App. B at 13a. Finally, the court of appeals did not disturb the lower court's finding, nor did the government even argue below that the documents were not personal.[3] Pet. App. A at 2a. That factual finding, having been decided in the courts below adversely to petitioner's contention here, does not merit review by this Court. *Berenyi v. Immigration Director*, 385 U.S. 630, 637 (1967).

2. The availability of the Fifth Amendment privilege to grand jury witnesses was recognized by this Court in *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and has been

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[3]In this regard, petitioner erroneously states (Pet. at 6) that "the court of appeals held that the Fifth Amendment privilege protects the contents of voluntarily prepared business records." However, a careful reading of the court of appeals opinion clearly reveals that "personal or private" documents are at issue in this case and formed the basis of the court of appeals holding. *See* Pet. App. A at 2a, 11a-12a.

reaffirmed in more recent cases. *See, e.g., United States v. Mandujano*, 425 U.S. 564, 572-73 (1976).

3. Contrary to petitioner's assertion (Pet. at 5), the judgment issued by the court of appeals in the case *sub judice* is not in conflict with the applicable decisions of this Court. For nearly a century, the decisions of this Court have strictly adhered to and reaffirmed the constitutional principle that the compelled production of an individual's private papers within his possession through the issuance of a subpoena *duces tecum* constitutes a violation of the Fifth Amendment privilege against self-incrimination. In the landmark case of *Boyd v. United States*, 116 U.S. 616 (1886), this Court unanimously acknowledged that the privacy interests protected by the Fifth Amendment extend beyond the mere delivery of oral testimony and accordingly held that the "compulsory production of . . . private books and papers . . . is [tantamount to] compelling [an individual] . . . to be a witness against himself . . ." *Id.* at 634-35. In *Boyd*, the government obtained an order from the district court requiring the petitioners to produce an invoice which reflected that they had failed to pay certain duties while importing plate glass. This Court ruled that the district court's order compelling petitioners to produce such a document constituted a violation of both the Fourth and Fifth Amendments.[4]

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[4]Relying on the English case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1066 (1765) in which Lord Camden asserted that "papers are the owner's . . . dearest property," Justice Bradley explained the "intimate relationship" between the Fourth and Fifth Amendment and stated:

> They throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned

In reaching its decision, this Court underscored the sanctity of an individual's right to privacy and explained:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgment.

Id. at 630.

On numerous occasions since *Boyd*, this Court has reaffirmed *Boyd's* principal holding that the privacy protected by the Fifth Amendment extends to shield an individual from the compulsory production of his private papers. *See, e.g., Bellis v. United States*, 417 U.S. 85, 87 (1974) ("[i]t has long been established . . . that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers . . . "); *United States v. Dionisio*, 410 U.S. 1, 11 (1973) (grand jury "cannot require the production by a person of private books and records that would incriminate him"); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) ("[a] mere handwriting exemplar, in contrast to the content of what is written . . . is . . . outside [the] protection" of the Fifth Amendment); *Schmerber v. California*, 384 U.S. 757,

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> in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," . . ., throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the fourth amendment.

116 U.S. at 633.

763-64 (1966) (the Fifth Amendment reaches only compulsion of "an accused's communications . . . for example, compliance with a subpoena to produce one's papers"); *United States v. White*, 322 U.S. 694, 701 (1944) ("the privilege against self-incrimination . . . protect[s] . . . the natural individual from compulsory incrimination through his own testimony or personal records"); *Sinclair v. United States*, 279 U.S. 263, 292-93 (1929) *quoting In Re Pacific Ry Comm'n*, 32 F. 241, 250 (C.C.N.D. Cal. 1887) (" '[o]f all the rights of the citizen, few are of greater importance or more essential . . . than the right of personal security, and that involves . . . exemption of his private affairs, books, and papers from the inspection and scrutiny of others.' "); *Wilson v. United States*, 221 U.S. 361, 377 (1911) (Fifth Amendment "[u]ndoubtedly . . . protected [the president] against the compulsory production of his private books and papers"); *I.C.C. v. Baird*, 194 U.S. 25, 45 (1904) ("the . . . Fifth Amendment[] . . . protect[s] a citizen from compulsory testimony against himself which may result in . . . the seizure of his papers by force, or their compulsory production . . ").

Despite these decisions, the petitioner relies on dicta from *Fisher v. United States*, 425 U.S. 391 (1976) and *United States v. Doe*, 104 S. Ct. 1237 (1984), two cases in which this Court considered the application of the Fifth Amendment to business records, to argue that *Boyd* has been overruled so that personal papers no longer enjoy any protection under the Fifth Amendment (Pet. at 8-9). Although it is undisputed that there has been a general demise of the Fifth Amendment privilege as applied to business records, *see Hale v. Henkel* 201 U.S. 43 (1906); *Grant v. United States* 227 U.S. 74 (1913); *United States v. White; Couch v. United States*, 409 U.S. 322 (1973); *Bellis v. United States; Fisher v. United States; United States v. Doe*, this Court has painstakingly distinguished cases calling for the

compulsory production of business records, from situations in which the government has subpoenaed an individual's private papers. *See Hale v. Henkel*, 201 U.S. at 74 ("we are of the opinion that there is a clear distinction . . . between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state"); *Grant v. United States*, 227 U.S. at 80 ("[t]he books and papers called for by the subpoena were corporate records and documents"); *United States v. White*, 322 U.S. at 704 ("[n]o valid claim was made that any part of [the subpoenaed documents] constituted his own private papers"); *Bellis v. United States*, 417 U.S. at 89-90 *quoting United States v. White*, 322 U.S. at 701 ("the privilege against compulsory self-incrimination . . . 'protect[s] only the natural individual from compulsory incrimination through his own testimony or personal records' ").

More recently, in *Fisher*, this Court considered the question of whether a taxpayer's Fifth Amendment privilege precluded enforcement of an Internal Revenue Service summons directing an attorney to produce business papers which had been prepared by an accountant and delivered to the attorney by the taxpayer. In holding there was no constitutional violation in the production of the business records, this Court was careful to note that "[s]pecial problems of privacy which might be presented by [a] subpoena of a personal diary are not involved here," and that it had not addressed the question of "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession . . . [since] the papers demanded here are not his 'private papers . . . .' " *Fisher v. United States*, 425 U.S. at 401 n.7 (citation omitted), 414. Similarly in *Doe*, where this Court ruled that an individual could be compelled to disclose the business records of his sole proprietorship, Justice Marshall explained that the Court had

not "reconsidered whether the Fifth Amendment provides protection for the contents of 'private papers of any kind.'" 104 S. Ct. at 1245 (Marshall J., concurring).

Consequently, contrary to petitioner's assertions, no cases of this Court, including those restricting the application of the Fifth Amendment to business records, have overruled *Boyd* nor held that the privilege against self-incrimination no longer protects the contents of an individual's personal papers when disclosure is compelled by the government. Instead, in each instance in which this Court has limited the protection to be afforded business records, this Court has exempted personal papers from its holding and suggested the continued vitality of the Fifth Amendment protection provided personal papers.[5]

4. The reservation of a Fifth Amendment protection for personal papers is wholly consistent with this Court's state-

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[5]Petitioner also relies on the case of *Andresen* v. *Maryland*, 427 U.S. 463 (1976), in which this Court held that the Fifth Amendment privilege does not protect an individual from the seizure of business records pursuant to a valid search warrant, to argue that the privilege against self-incrimination should no longer shield a citizen from a disclosure of his personal papers pursuant to a subpoena *duces tecum*. In *Andresen*, however, this Court repeatedly underscored the fact that the documents at issue were "business records" and limited its holding by stating, "[t]his case presents the issue whether the introduction into evidence of a person's business records, seized during a search of his offices, violates the Fifth Amendment . . . ." *Id.* at 465. Moreover, Justice Blackman noted that since the seizure in *Andresen* was pursuant to a search warrant and thus the "petitioner was not asked to say or to do anything," the requirement of testimonial compulsion necessary to trigger the invocation of the Fifth Amendment was missing. *Id.* at 473. In *Andresen*, again recognizing the narrowness of its holding, the Court noted that "the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession . . . ." *Id.* at 473-74.

ments that the Fifth Amendment be construed to safeguard an individual's privacy interests. *See Bellis v. United States*, 417 U.S. at 91 (Fifth Amendment protects an "inner sanctum which necessarily includes an individual's papers . . ."); *Couch v. United States*, 409 U.S. at 327 (Fifth Amendment "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[s]elf [i]ncrimination [c]lause enables the citizen to create a zone of privacy which [the] government may not force him to surrender to his detriment"); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) *quoting United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank J., dissenting) *rev'd* 353 U.S. 391 (1957) (Fifth Amendment reflects "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' ").

Recognizing that the protection of one's ability to develop ideas free from governmental intrusion and the fear of self-incrimination is one of the fundamental purposes of the Amendment, it is only logical that the self-incrimination clause be applied so as to shield an individual from the compelled production of private writings since such documents are mere extensions of the thought process. *See Fisher v. United States*, 425 U.S. at 420 (Brennan J., concurring). If this Court were to eradicate all protection for private papers, so as to allow the government to compel an individual to produce a personal private writing, then "[t]he ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or events of those memories would become the subjects of criminal sanctions . . . ." *Id.* Just as this Court has recognized that an individual's "fantasies . . . are his own and

beyond the reach of government," so too are his personal writings regarding his thoughts and private actions. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973). If the Fifth Amendment proscribes the government from compelling an individual to disclose the contents of his thought, then it must likewise proscribe compelling an individual to disclose papers on which he has worded those private ideas. *See Boyd v. United States*, 116 U.S. at 633.[6]

In the case *sub judice*, the subpoena *duces tecum*, calling for the production of respondent's personal records, is tantamount to the classic situation of the government's attempting to subpoena an individual's private diary. More specifically, the government seeks to subpoena "[r]ecords of purchases, trades, sales, receipts, gifts and distribution of controlled substances," including a virtual diary of all persons with whom respondent may have dealt with regard to controlled substances,and all expenses related thereto (Pet. App. at 20a). Since these records represent nothing more than a personal log of alleged transactions, it is difficult to perceive how they differ in any significant respect from a personal diary containing the words "I sold drugs to X today." Consequently, this case should be analyzed as one

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[6]The petitioner also argues (Pet. at 12-13) that the analysis applied to business records in *Fisher* and *Doe* be extended so as to eliminate all protection for personal records. Specifically, in *Fisher* and *Doe*, this Court refused to protect the contents of business records from compulsory production unless the creation of the document was actually compelled. *See Fisher* v. *United States*, 425 U.S. at 410 n.11 and *United States* v. *Doe*, 104 S.Ct. at 1241. To apply such an analysis to personal papers, however, would not only eradicate any and all Fifth Amendment protection for personal writings, since there would rarely if ever be an occasion where someone is compelled to keep a diary of his private life, but in so doing would violate this Court's own mandate that the Fifth Amendment be construed to protect privacy interests.

wherein the government has sought the most private, personal papers of an individual through the compulsion of a subpoena.[7]

Petitioner also argues (Pet. at 11-12) that *Doe* and *Fisher* should be read to overrule *Boyd*, since it is inherently inconsistent to treat personal papers any differently from business records. This Court, however, has acknowledged and explicitly held that the very nature of the item at issue may in fact determine the extent of the constitutional protection it is entitled to receive. For example, in the First Amendment context, this Court has already recognized that commercial speech is entitled to far less protection than other forms of speech. *See Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981); *Ohralik Inc. v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779-80 (1976). As this Court has explained:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment

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[7]Petitioner's "suspicion" (Pet. at 12) that respondent is a "sole proprietor" of an illegal drug and real estate venture forms the basis for its disingenuous argument that all personal records are therefore transformed into sole proprietorship business records. If this logic were accepted, however, there would be no logical limit to its application. Anyone suspected of illegal conduct could, under petitioner's theory, be viewed as a sole proprietor engaged in the suspected illegal conduct as a business. The goverment would then subpoena the records of all grand jury targets without any regard for their personal nature. Petitioner's argument is simply an attempt to avoid the issue that is squarely presented here: that it is attempting to obtain personal records through the compulsion of a subpoena.

> to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456. *See also Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562-63 (1980) (citations omitted) ("[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression [and thus] [t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation"); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), *quoting Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("'[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material'").

The disparate First Amendment protection afforded commercial and noncommercial speech is analogous to the disparate Fifth Amendment protection this Court has provided to business and personal records. There is nothing inherently inconsistent in this Court's long standing policy of extending a greater degree of protection to personal papers than to business records.

5. Petitioner offers no cogent policy reason for departing from the long-standing protection afforded personal records. Petitioner's assertion (Pet. at 5) that such records are of "great value in detecting and investigating crime" is beside the point; the same could be said of a compelled confession. In neither of these situations should the result dictate the application and the extent of the constitutional

protection. Indeed, to accept petitioner's Fifth Amendment argument would lead to a demise in the adversarial system of justice which has heretofore required the government to prove its case without compelling a suspect to reveal his personal thoughts, whether spoken or written.

Petitioner does not suggest that law enforcement agencies are unable to function effectively due to an inability to compel a suspect to produce his personal papers. Petitioner flatly asserts (Pet. at 5-6) that personal records are "subpoenaed frequently" and that the issue presented in this case is a recurring one, but offers no support for this claim.[8]

The long-standing Fifth Amendment protection afforded private papers properly reflects a public policy recognizing the privacy interests involved. The government presents no public policy argument suggesting why this protection should now be abandoned. Accordingly, the Fifth Amendment protection should continue to apply to the personal documents at issue here.

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[8]While contending that the issue presented here is a "recurring one," petitioner significantly omits any citation to court of appeals' decisions that either support petitioner's Fifth Amendment argument regarding personal papers, or suggest that the issue is a recurring one. Similarly, petitioner does not contend that the decision of the Court of Appeals for the Fourth Circuit in the case *sub judice* is in "conflict with the decision of another federal court of appeals on the same matter." Supreme Court Rule 17.1(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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